Filed 3/30/17 P. v. Hwang CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DON MING HWANG, Defendant and Appellant.	G052412 (Super. Ct. No. 07NF2407) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Kazuharu Makino, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Marvin E. Mizell, and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Don Ming Hwang appeals from the trial court's postjudgment order denying his petition to have his 2007 transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), conviction reduced to a misdemeanor under Proposition 47 (Pen. Code, § 1170.18).[1] Hwang argues the Legislature's 2014 amendment to Health and Safety Code section 11379 establishes the trial court erred by denying his petition and his equal protection rights were violated. None of his contentions have merit, and we affirm the postjudgment order.

FACTS

A complaint charged Hwang with the following offenses, all occurring on or about July 1, 2007: transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a), count 1); possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 2), and misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364, count 3). On July 10, 2007, Hwang pled guilty to all the offenses admitting he "unlawfully transport[ed] for personal use a usable quantity of methamphetamine and did unlawfully possess a device for smoking a controlled substance." The trial court placed Hwang on three years of formal probation on counts 1 and 3, and ordered him to complete a drug treatment program; the court stayed the punishment on count 2. On August 20, 2010, Hwang's case was closed because the probationary period expired.

On May 8, 2015, Hwang in propria persona filed, from the San Luis Obispo, California Men's Colony West, a petition to have his felony convictions reduced to misdemeanors pursuant to section 1170.18. Hwang appeared in propria person at a hearing on June 11, 2015. Without any opposition from the prosecutor, the trial court granted Hwang's motion to reduce his conviction in count 2 for possession of methamphetamine to a misdemeanor. After the prosecutor opposed Hwang's motion as

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

to count 1, the court denied the motion to reduce the conviction to a misdemeanor because transporting methamphetamine was not an "eligible charge."

DISCUSSION

On November 4, 2014, the voters approved Proposition 47, the Safe Neighborhoods and Schools Act (Proposition 47 or the Act) and it became effective the following day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) The Act "makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*Id*. at p. 1091.)

The Act created new section 1170.18, which allows a person currently serving a sentence for a conviction of a felony who would have been guilty of a misdemeanor under the Act to petition for a recall of his or her sentence and be resentenced to a misdemeanor. (§ 1170.18, subds. (a), (b).) The Act also allows a person who has completed a sentence for a felony that would now be a misdemeanor under the Act to file an application with the trial court to have that felony conviction designated as a misdemeanor. (§ 1170.18, subds. (f), (g).) Proposition 47 amended Health and Safety Code section 11377 to define simple possession of methamphetamine as a misdemeanor, subject to various exceptions not relevant here. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108-1109.)

First, Hwang argues the trial court erred by denying his motion to reduce count 1 to a misdemeanor. We disagree.

Health and Safety Code section 11379 was not explicitly amended by Proposition 47, and transportation of a controlled substance is not a class of offenses redefined by Proposition 47. The Legislature's inclusion of specific statutory sections, but not Health and Safety Code section 11379, shows the Legislature intended to exclude section 11379. Thus, Hwang would have been guilty of a felony, not a misdemeanor,

even if Proposition 47 had been in effect as of the date of his conviction for Health and Safety Code section 11379.

Second, Hwang contends conduct underlying his transportation conviction would today amount to a mere violation of Health and Safety Code section 11377, which is expressly covered by Proposition 47 and is designated as a misdemeanor.[2] Not so.

At the time of Hwang's conviction, courts interpreted Health and Safety Code section 11379 as applying to transportation even for personal use. (*People v. Rogers* (1971) 5 Cal.3d 129, 134-135 (*Rogers*).) However, effective January 1, 2014, the Legislature amended the statute to add the requirement the transportation be for sale. (Health & Saf. Code, § 11379, subd. (c) [transport means to transport for sale].) It is well settled a statute lessening punishment is presumed to apply to all cases not yet reduced to final judgment when the statute becomes effective. (*In re Estrada* (1965) 63 Cal.2d 740, 744-748.) Hwang's conviction for transportation of methamphetamine under Health and Safety Code section 11379, subdivision (a), was final in 2010; the amendment to that statute changing the elements of the offense became effective on January 1, 2014.

Until January 1, 2014, the offense of transporting methamphetamine under Health and Safety Code section 11379 did not require transportation for sale and the Legislature's amendment on January 1, 2014, was a change in the law and not a clarification of the law. (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 [constitution assigns to courts power of statutory interpretation and when finally and definitively exercised Legislature does not have power to state legislative amendment declared existing law].) Thus, any examination of Hwang's conduct to determine whether he was eligible would be futile because assuming Proposition 47 had been in effect when Hwang committed his offense in 2007, he would still be guilty of a felony

---

[2] The identical issue is currently under review at the California Supreme Court. (*People v. Martinez*, review granted March 23, 2016, S231826.) The matter was fully briefed in October 2016.

not covered by Proposition 47 because the amendment to Health and Safety Code section 11379 did not go into effect until 2014.

Finally, Hwang asserts the trial court's denial of his motion to reduce his count 1 conviction to a misdemeanor violated his equal protection rights because he is similarly situated to other defendants who transported methamphetamine for personal use, i.e., simple possession (Health & Saf. Code, § § 11377). Again, we disagree.

"The concept of equal treatment under the laws means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment. [Citation.] '"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly *situated groups* in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."' [Citations.]" (*People v. Morales* (2016) 63 Cal.4th 399, 408.)

If Hwang were charged with count 1 after January 1, 2014, the prosecution would have to prove the transportation of a controlled substance was for sale. (Health & Saf. Code, § 11379, subd. (c).) The prosecution was not required to do so when Hwang was convicted in 2007. (Health & Saf. Code, former § 11379 (eff. Jan. 1, 2002, to Sept. 30, 2011).) The Legislature's January 1, 2014, amendment did not implicate Hwang's equal protection rights. As we explain above, Hwang was properly convicted of transportation for personal use as our Supreme Court in *Rogers, supra,* 5 Cal.3d 129, had interpreted the scope of a transportation offense in 1971. The fact the Legislature has since changed the law does not make the defendant similarly situated with individuals convicted under the current law. "'[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.'" (*People v. Floyd* (2003) 31 Cal.4th 179, 191.)

DISPOSITION

The postjudgment order is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.